STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC.	DOCKET NO. INU-99-3

ORDER DENYING PETITION TO DEREGULATE

(Issued March 1, 2000)

On May 25, 1999, U S West Communications, Inc. (U S West), filed a petition for determination of effective competition, for waiver of accounting plan requirement, and for expedited consideration, pursuant to Iowa Code § 476.1D (1999). U S West asks for a determination that certain portions of U S West's existing local exchange service area have become subject to effective competition and should be deregulated. U S West calls these areas "competitive zones."

The alleged competitive zones comprise two small geographic areas of U S West's certificated service territory in which South Slope Cooperative Telephone Company (South Slope) has authority to provide competitive local exchange telecommunications service. These areas are located generally west of Coralville, Iowa, and south of Cedar Rapids, Iowa.

If the competitive zones are deregulated, U S West requests a waiver of the Utilities Board (Board) rules requiring the filing of an accounting plan for deregulated services. U S West's rates are currently governed by a price regulation plan under

Iowa Code § 476.97; in the past, the Board has granted similar waivers to companies operating under price regulation.

On June 11, 1999, South Slope filed an answer to the petition and a motion to dismiss, arguing the Board lacks authority to deregulate a service or facility in a geographically-limited region. On June 24, 1999, AT&T Communications of the Midwest, Inc. (AT&T), and MCI WorldCom, Inc. (MCI), filed a response to U S West's petition. Finally, on June 25, 1999, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a response to the petition, a joinder in South Slope's motion to dismiss, and a request for an order directing compliance with 199 IAC 5.2(2)"c" (1999). As an alternative to its joinder in the motion to dismiss, Consumer Advocate asked the Board to docket this matter as a formal notice and comment proceeding with evidentiary hearings and discovery to develop a reliable record.

On July 1, 1999, U S West filed a combined response to the South Slope, AT&T, MCI, and Consumer Advocate motions, arguing the Board has the statutory authority to deregulate telecommunications services on a geographically-defined basis and the Board should exercise that authority in this docket.

On July 23, 1999, the Board issued an order denying the motions to dismiss based upon a preliminary determination that the Board has the authority to deregulate telecommunications services and facilities on a less-than-statewide basis, in appropriate cases. The Board also granted Consumer Advocate's request for a

formal notice and comment proceeding, deferred the ruling on waiver of accounting plan, and directed U S West to comply with the identification requirements of 199 IAC 5.2(2)"c" and notice requirements of 199 IAC 5.3(3).

On September 10, 1999, position statements were filed by U S West, South Slope, Consumer Advocate, AT&T, MCI, McLeodUSA Telecommunications Services, Inc. (McLeodUSA), and the Iowa Telecommunications Association in conjunction with the Rural Iowa Independent Telephone Associate (ITA/RIITA). Counterstatements were filed by U S West and Consumer Advocate on September 28, 1999.

As part of its position statement, Consumer Advocate requested initiation of rule making proceedings, asking the Board to delay action on U S West's petition for deregulation of competitive zones while the Board considers and, if necessary, adopts rules setting out the Board's policy regarding deregulation on a less-than-statewide basis. On October 11, 1999, the Board denied Consumer Advocate's request for rule making, stating it was "not feasible or practicable because it would unduly delay the agency ruling on U S West's petition and because it may be premature to conclude that the Board is already in a position to consider and adopt final principles regarding deregulation on a geographic basis." (Order p. 5).

On October 12, 1999, the Board held a comment hearing with the following parties represented: U S West, South Slope, Consumer Advocate, AT&T, MCI, McLeod, and the ITA/RITA. The following witnesses testified at the comment

hearing: Max Phillips (U S West), J. R. Brumley (CEO, South Slope), Carl Hunt (economist for Consumer Advocate), Richard Cabe (economist for MCI), and John Finnegan (AT&T).

Written statements by Jerry Melick on behalf of ITA/RIITA and Robert Smith on behalf of McLeod were also offered and received.

On November 2, 1999, initial briefs were filed by U S West, South Slope, Consumer Advocate, McLeod, and MCI/AT&T. On November 19, 1999, U S West, South Slope, Consumer Advocate, and MCI/AT&T filed reply briefs

On November 5, 1999, South Slope filed a motion to strike a portion of U S West's initial brief. This motion was denied by Board order dated December 22, 1999.

JURISDICTION

The Board has jurisdiction of this matter pursuant to Iowa Code § 476.1D, which provides that the jurisdiction of the Board shall not apply to a telecommunications service if the Board finds the service is subject to effective competition. The Board has adopted rules specifying the procedures and standards for determining the existence of effective competition. See 199 IAC ch. 5.

ANALYSIS

1. Does Iowa Code § 476.1C authorize the Board to deregulate a service or facility on anything other than a statewide basis?

The first issue the Board must address is whether Iowa Code § 476.1D permits deregulation of a telecommunications service or facility on anything other than a state-wide basis. Iowa Code § 476.1D(1) provides:

> Except as provided in this section, the jurisdiction of the board as to the regulation of communications services is not applicable to a service or facility that is provided or is proposed to be provided by a telephone utility that is or becomes subject to effective competition, as determined by the board. In determining whether a service or facility is or becomes subject to effective competition, the board shall consider, among other factors, whether a comparable service or facility is available from a supplier other than the telephone utility and whether market forces are sufficient to assure just and reasonable rates without regulation.

As discussed above, the Board issued a tentative ruling on this issue on July 23, 1999, in response to the motion to dismiss filed by South Slope and joined by others. In that ruling, the Board discussed two decisions from other dockets in which the Board declined to deregulate on a less-than-statewide basis. The Board noted that both of those decisions turned, in part, on the accounting difficulties and administrative burdens associated with separating regulated and deregulated investment, expenses, and revenues for rate making purposes. The Board expressed the tentative opinion in this docket that, with the widespread use of price regulation in place of traditional rate regulation, the accounting concerns may no

longer be as significant. The Board concluded that deregulation on a less-than-statewide basis deserves a fresh look. Accordingly, the motions to dismiss were denied.

Because the Board's jurisdictional determination was only tentative, the parties have continued to present and refine their arguments concerning this issue. U S West argues that competition will develop in a geographically-scattered manner within exchange boundaries. As a result, if the statute is interpreted to require that U S West must face competition in the entire state, or even an entire exchange, before deregulation can occur, U S West will be unable to respond when it is faced with competition for its most desirable customers. U S West appears to be arguing that the Legislature did not intend to limit the Board's deregulation authority to statewide services or facilities.

Consumer Advocate argues that Iowa Code § 476.1D only authorizes deregulation of services or facilities, not geographic zones. Consumer Advocate argues that it is "unlikely" that the General Assembly intended the word "service" to mean anything less than a statewide offering, so services can only be deregulated on a statewide basis.

Consumer Advocate also argues that, if the Board determines it has the authority to deregulate a service or facility that can be defined on a geographic basis, then U S West has utterly failed to define any such service or facility. Consumer Advocate notes that U S West is unable to determine the number of customers

located in the alleged competitive zones and, therefore, cannot identify and separate its investment, revenues, and expenses from the zone, as required by Iowa Code § 476.1D.

McLeodUSA argues that Iowa Code § 476.1D permits deregulation only of a service or facility, not of a geographic zone, but McLeodUSA does not develop the argument. MCI and AT&T argue that U S West has defined a competitive zone as a geographic area where the requirements of Iowa Code § 476.1D are met (Tr. 12), apparently arguing that U S West's argument is circular because it attempts to define the competitive zone in terms of a service or facility that may not be geographically limited. MCI and AT&T also argue the statute limits deregulation to services or facilities, which is not what U S West has requested. They quote from U S West's petition, which says the Board should focus on areas, rather than services, when determining whether to deregulate.

Finally, MCI and AT&T argue that the word "facility" is defined in chapter 476A, relating to electric generating plants, in terms of a discrete, concrete entity that serves a specific function, while the dictionary definition of "facility" also emphasizes the idea of something designed, built, or installed to perform a particular function. They argue that these definitions make it clear that a "facility" cannot be defined in terms of a geographic area, but must instead be defined in terms of the function performed or the service provided.

South Slope argues that the deregulation statute does not refer to or permit deregulation of a "competitive zone" or a "telecommunications market." Instead, the statute only permits deregulation of a service or facility that is subject to effective competition. South Slope argues the statute is not ambiguous and cannot be re-written to accommodate U S West's petition.

South Slope also argues that geographic deregulation would be inconsistent with two other statutes, Iowa Code §§ 476.29 and 476.100. Section 476.29 provides for issuance of certificates of public convenience and necessity, requiring that providers offer service within geographically-defined service territories. South Slope believes this requirement is inconsistent with deregulation of geographically-defined services. Section 476.100 prohibits local exchange carriers from engaging in certain anti-competitive practices. South Slope appears to argue the statute will be impossible to enforce if geographic areas as small as individual buildings can be deregulated.

The Board will re-affirm its earlier, tentative conclusion that a service or facility that is subject to effective competition may be deregulated on a geographically-limited basis if it can be logically and reasonably defined in geographic terms. Any alternative would require that U S West continue to be subject to statewide regulation as competition grows and many, but not all, customers gain choices for their local exchange service. The result would be an invitation to cream-skimming by competitive local exchange service providers.

The Board does not believe this interpretation is at odds with the other statutes identified by South Slope. Section 476.29 is intended to ensure the availability of service in all parts of the state. By definition, if competitive services are available in an area, then service is available in that area, and deregulation of the competitive services does not change that situation.

It is not clear why South Slope believes § 476.100 will be unenforceable if deregulation of competitive zones is permitted. There is nothing in that statute that requires that services be regulated pursuant to any other statute. The Board is confident that § 476.100 can be enforced regardless of whether an area has been deregulated.

2. Is it in the public interest to deregulate on the basis of geographic regions smaller than an existing exchange?

The next issue for the Board to decide is whether it is in the public interest to deregulate services or facilities on the basis of regions that are smaller than an existing telephone exchange. U S West asks the Board to deregulate "competitive zones" that are parts of the existing Iowa City and Cedar Rapids exchanges. South Slope and some of the other parties argue that the Board should not deregulate any zones smaller than an exchange. A corollary of this argument is that the Board should examine the availability of competitive services in the entire exchange before it deregulates.

U S West argues that competition will generally develop in areas defined by the concentration of the most lucrative customers, rather than by exchange

boundaries. U S West further argues that any particular exchange may include some areas where competition will be available at an early date, while other customers in the same exchange may wait some time for the benefits of competition. During that time period, U S West believes it should not be prevented from competing for those customers who have a choice.

U S West also argues that competition in an area smaller than an exchange was the inevitable result of the Board's approval of South Slope's application to serve parts, but not all, of the Cedar Rapids and Iowa City exchanges. According to U S West, if the Board decides not to permit deregulation of services in an area smaller than an exchange, then the Board should not have amended South Slope's certificate to permit competition for less than the entire exchange.

Finally, U S West argues that there is no indication in § 476.1D that the Legislature intended to limit deregulation to the exchange level.

Consumer Advocate argues that deregulation of areas or zones defined by the entry of a single competitor is an invitation to anti-competitive behavior by the incumbent and will discourage widespread competitive entry.

MCI and AT&T point out that U S West agreed, at the hearing, that a "competitive zone" could be as small as a single floor of a building or a single residence. (Tr. 46-48, 115, 121-23). These intervenors argue that deregulation on such a small scale would have the same effect as deregulation on a customer-by-customer basis, which would amount to permitting U S West to negotiate prices with

customers on an individual case basis whenever a single alternative provider appears on the scene. MCI and AT&T point out that the Board rejected U S West's proposal to price nonbasic services on an individual case basis in Docket No. RPU-98-4, the U S West price plan docket. In that order, the Board found that permitting U S West to negotiate different prices with different customers, when U S West is still the only service provider for many customers, would be unlawful, anticompetitive, and discriminatory.

South Slope argues that the concept of a "competitive zone" is unrelated to the "exchange[,] which is the basic unit" of the telephone industry. South Slope argues that if the competitive zone is not tied to the exchange in some manner, it is a meaningless term, unsupported by statute or rule.

The issue here, in its most basic terms, is: "How small is too small?" The Board believes the answer to this question should be determined by the extent of the effective competition. In other words, services can be deregulated in an area that matches the extent of the effective competition, whatever that area may be. This is, of necessity, a fact-sensitive determination that will need to be made separately in each situation where the competition is not offered in exactly the same area as the incumbent's offering.

The Board disagrees with the argument of MCI and AT&T that this amounts to letting U S West negotiate rates on an individual case basis. That argument assumes that a competitor would enter the market to serve only a single customer,

and that the Board would issue a certificate to the competitor, pursuant to Iowa Code § 476.29, for a one-customer service territory. No competitor has asked the Board for such a limited service territory and the Board will not pre-judge any such request, but it is safe to say that the issues associated with any such request can be addressed if and when a prospective competitor files it.

3. Are the services offered by U S West in the alleged competitive zones subject to effective competition?

a. Criteria

Iowa Code § 476.1(D) establishes two factors that the Board must consider in determining whether a communications service or facility is subject to effective competition: First is "whether a comparable service or facility is available from a supplier other than the telephone utility," and second is "whether market forces are sufficient to assure just and reasonable rates without regulation."

Based on these statutory provisions, the Board's rules, 199 IAC 5.6(1), specify criteria the Board may consider in determining whether a comparable service or facility is available from a supplier other than the telephone utility and whether market forces are sufficient to ensure just and reasonable rates without regulation:

a) The ability or inability of a single provider to determine or control prices;

b) The ease with which other providers may enter the market;

c) The likelihood that other providers will enter the market;

d) The substitutability of one service or facility for another; and

e) Other relevant considerations.

The Board will apply these criteria in determining whether U S West is subject to effective competition in the alleged competitive zones.

b. Arguments of the parties

U S West argues the legislative test for effective competition has been met. U S West relies heavily on the testimony of South Slope witness Brumley, who testified that he is unaware of any services that U S West provides in the competitive zone that South Slope does not provide. (Tr. 156).

U S West also argues that the evidence at hearing demonstrates that the five criteria contained in the Board's rules have been met. First, no evidence was offered indicating U S West controls prices in the competitive zones. Witness Brumley testified that South Slope's prices are the same in the competitive zones as they are in the rest of its service territory. (Tr. 157). Thus, U S West's prices do not serve as a price signal that South Slope follows, and U S West concludes that it does not have the ability to control prices in the competitive zones.

The second factor is the ease with which other competitors may enter the market. U S West argues that no evidence was offered to indicate South Slope had any problems entering the market. U S West asserts that the barriers identified by witness Brumley, including entering into an interconnection agreement with U S West

and construction time and cost, should not be considered barriers to entry under the Board's rules.

The third factor is the likelihood that other competitors will, in fact, enter the relevant market. U S West argues there is 100 percent likelihood that other providers will enter the market because it has already happened through South Slope.

The fourth factor is the substitutability of the competitor's services for those of U S West. U S West argues the evidence supports the proposition that South Slope's service can be substituted for U S West's service and vice versa, relying (in part) on the testimony of South Slope witness Brumley that he is not aware of any service offered by U S West that South Slope does not also offer. (Tr. 156).

U S West did not specifically address the fifth factor in the Board's rules, "other relevant considerations." However, other parties proposed tests that might best be considered under this section.

Consumer Advocate argues that U S West's local exchange services are not subject to effective competition. A determination of effective competition is essentially an assessment of market power. The Board has historically recognized the relevance of market power and market share in rule amendments and prior deregulation proceedings.

Outside of the Coral Ridge Mall, South Slope serves 19 residential customers in Cedar Rapids, 9 business customers in Cedar Rapids, and no residential customers in Iowa City. (Tr. 178-79, 292). South Slope has been unable to attract customers outside the mall despite offering service at rates that are one-half of U S West's residential rate and one-third of U S West's business rate. (Tr. 24). The fact U S West has retained customers given this price disparity is evidence of U S West's continuing market power.

In its market power analysis, Consumer Advocate relies on the Herfindahl-Hirschman Index (HHI) as the preferred test for measuring market concentration and market power. (Tr. 270). However, the Board finds the HHI of little use in this context. The index would require the existence of six wireline providers with roughly similar market shares of 10 to 40 percent each before a service could be deregulated. (Tr. 274, 299-301). No evidence has been offered that this condition is likely to be satisfied anywhere in the Iowa local exchange marketplace; in fact, it has not yet happened in the interexchange services market, which the Board has already deregulated. (Tr. 300). If the Board were to adopt the HHI as its test for effective competition, the practical effect would be to nullify Iowa Code § 476.1D by imposing

a standard that is never likely to be met. The Board rejects the HHI index as the test for effective competition under Iowa Code § 476.1D.

AT&T/MCI argue that until U S West meets the market opening provisions of Section 271 of the Telecommunications Act, effective competition cannot exist. U S West counters that this argument ignores the existence of another facilities-based carrier in the alleged competitive zones. South Slope did not have to rely on the provisions of § 271 in order to enter these zones, primarily because South Slope does not depend on U S West's facilities to provide service.

AT&T/MCI also argue that a duopoly with barriers to entry cannot be regarded as effective competition. Consumer Advocate and AT&T/MCI both argue that market power exists under a duopoly and, as such, effective competition cannot exist.

If the Board were to rule that a duopoly can never be regarded as effective competition for purposes of § 476.1D, then the Board would never be able to deregulate a service or facility until there were at least three facilities-based providers in the marketplace. Like Consumer Advocate's HHI index, such a ruling might create an insurmountable barrier to future deregulation, because it may be unrealistic to expect that many customers will ever have the choice of three (or four, or five) facilities-based providers. Moreover, such a finding would ignore South Slope's undeniable ability and willingness to serve.

South Slope argues its ability to provide facilities-based choice in the applicable zones was primarily due to an anomaly in Board regulation that allowed

South Slope to expand service to a part of an exchange. South Slope's ability to attract customers at the Coral Ridge Mall was primarily the result of U S West's service delays, rather than effective competition. (Tr. 175-76). The Coral Ridge Mall is only one small part of the overall area comprising the competitive zones. Outside of the Mall, South Slope has had little success in attracting customers. (Tr. 178-79, 292).

South Slope characterizes U S West's position as: "Wherever two facilities based telecommunications carriers are gathered, there is effective competition." (South Slope Reply Brief, p. 2). South Slope argues that U S West does not address market forces and other factors giving meaning to the statutory phrase effective competition. In addition, U S West's witness was unable to quantify the substitutability of South Slope's services for U S West's services because the witness was unable to speak to obsolete services in U S West's tariff, the existence of customers bound to U S West as part of national accounts, and any economic model. (Tr. 61, 70, 84).

c. Discussion

The Board finds that the record in this case does not support a determination of effective competition in the applicable zones. U S West believes the criteria established in 199 IAC 5.6(1) are satisfied if a comparable service or facility is available from a supplier other than the telephone utility. U S West witness Phillips testified as follows:

> My interpretation of the statute is that if there's another provider of service that is available in the marketplace, that the Board has to find a determination of effective competition.

(Tr. 44). This interpretation ignores the conjunctive in the statute that requires the Board also consider whether market forces are sufficient to ensure just and reasonable rates without regulation. U S West has not made any showing regarding market forces in the alleged competitive zones. An examination of the record and the competitive criteria from the Board's rules raises serious questions regarding the potential effectiveness of market forces in the zones.

i. Does any single provider have the ability to determine or control prices?

The record does not support U S West's claim that a single provider in the applicable zones does not have the ability to determine or control prices. In fact, the price information provided in the record indicates that South Slope's presence at substantially lower rates is not sufficient to overcome U S West's market advantages and lead to price competition. (Tr. 175). In the Stoney Point Heights area of the applicable Cedar Rapids' zone, U S West's residential rates are about 50 percent higher than South Slope's rates, but South Slope has only been able to capture one-third of the market. (Tr. 63). In the Coral Ridge Mall, U S West was able to attract customers at a rate approximately three times South Slope's rate. (Tr. 64). These market results occur even though the record supports South Slope's high service quality (Tr. 148, 162, 173) and marketing efforts. (Tr. 160). In an effectively

competitive market, South Slope should have captured the majority of the market if it is offering comparable services at one-half to one-third the rates of U S West.

The fact that South Slope has not captured the majority of the market tends to show that U S West has the ability to set its own prices, regardless of the competition, and still retain a substantial market share. This means U S West has the ability to determine its own prices in the alleged competitive zones to a significant degree, despite the existence of allegedly effective competition.

ii. Is there ease of entry for other providers in the market?

MCI's expert witness testified that compliance with the Section 271 criteria found in the Telecommunications Act plus the existence of two-facilities based providers may be sufficient for an effective competition finding. (Tr. 240-242). U S West has not met these criteria, especially with regard to its operational support systems (OSS). Although MCI refers to the § 271 criteria as "other relevant factors" under 199 IAC 5.6(1), the barriers to entry created by U S West's failure to meet these criteria also relate to the ease of entry for other potential providers.

The Board agrees with AT&T and MCI that U S West's failure to meet the requirements of § 271 is a factor to be considered in this docket, but it is only one factor. The Board will not make § 271 compliance a prerequisite to deregulation. Here, it is significant that South Slope has been able to establish a viable competitive presence despite U S West's § 271 status. However, it is also significant that South Slope was able to achieve its position

due to some unusual circumstances that may not apply to most other potential competitors. The Board concludes that U S West's alleged failure to meet the § 271 criteria makes it more difficult, but not impossible, for other potential providers to enter these markets.

iii. How likely is it that other providers will enter the market?

The record reveals that the zones were created through an anomaly in Board regulation resulting from the proximity of South Slope's existing service territory and South Slope's particular plans for system expansion. The anomaly in state regulation resulted when the Board allowed South Slope to extend its facilities into U S West's service territory on a less-than-exchange basis. South Slope's adjacent exchange made it economical to extend its network through fiber loops that are capable of serving parts of U S West's Cedar Rapids and Iowa City exchanges. South Slope did not need interconnection trunks with U S West or number portability or directory listings in order to enter this market. (Tr. 234). It is unlikely that any other provider would have this same opportunity in these zones. As such, it is unlikely another facilities-based provider will enter this market in the same manner as South Slope.

iv. Is the service or facility substitutable for the incumbent's service or facility?

This criteria attempts to capture the legislative intent behind the statutory language: Is a comparable service or facility available from a supplier other than the

telephone utility? The statute requires comparable (or substitutable) services or facilities rather than identical services or facilities.

U S West is seeking deregulation of all services in its Tariff No. 1. (Tr. 60). U S West witness Phillips testified that all services in Tariff 1 are retail services including 911 service and rates for trunks. (Tr. 60-62). All parties agree South Slope offers facilities-based telecommunications services in the applicable zones. However, the record does not specifically identify the services U S West offers in the zones, and U S West witness Phillips was unable to answer questions concerning particular services offered in Tariff 1, including Centrex and ISDN. (Tr. 61). Witness Phillips was also unable to identify the percentage of lines within each exchange that would be deregulated. (Tr. 35).

In support of its argument that South Slope offers services that are substitutes for U S West's, U S West relies heavily on this testimony from the South Slope witness:

> Q. Are you aware of services that U S West provides in the competitive zone that South Slope cannot provide?
>
> A. Unless it would be a package service or something.

(Tr. 156). While this statement is generally supportive of U S West's position, it cannot bear the entire burden by itself. U S West offered Exhibit 100 to show the services South Slope offers in the competitive zones (id.), but U S West offered no similar exhibit to show its own services. This record is insufficient to establish that

South Slope's services are substitutes for U S West's when U S West has not specified its own services.

v. Other relevant considerations

The Board has already concluded that U S West's petition must be denied, based upon consideration of the first four factors. No purpose will be served by examining other relevant factors at this time.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The petition for deregulation of competitive zones filed by U S West Communications, Inc., on May 25, 1999, and identified by the Board as Docket No. INU-99-3, is denied.

2. The request for waiver of accounting plan requirement filed as a part of U S West's petition for deregulation is moot and, therefore, denied.

UTILITIES BOARD

/s/ Susan J. Frye

/s/ Diane Munns

DISSENT

I am writing to express my disagreement with the Board's decision not to deregulate the competitive zones defined by the overlapping service offerings of South Slope and U S West. I am in full agreement with the first two sections of the Board's decision, finding that services can be deregulated on a geographically-limited basis when effective competition exists in specified areas and when the services can reasonably be defined in terms of those areas, but I disagree with the Board's decision that U S West has not proven the existence of effective competition in the competitive zones.

There can be no doubt that comparable services are available in these zones from a supplier other than U S West, so the first statutory consideration is met. It is my belief that the second statutory consideration, that is, the existence of market forces sufficient to assure just and reasonable rates without regulation, is also satisfied by this record.

A review of the criteria from the Board's rules further demonstrates that there is effective competition in the competitive zones. First, no provider is in a position to control prices; U S West and South Slope have each set their own prices, at different levels. U S West's rates match the rates it offers in the rest of its service territory. (Tr. 72). The same is true of South Slope. (Tr. 157). Further, Consumer Advocate's witness testified that, in his opinion, if services were deregulated in the competitive zones it was unlikely that prices would change greatly over the next five years,

although U S West might be expected to increase some prices. (Tr. 312-13). Clearly, neither provider is controlling the prices of the other.

The second and third criteria from the Board's rules can be considered together: How easy and how likely is it that other providers will enter the market? South Slope's actual entry into the market demonstrates the ease of entry into these zones. While other potential providers may not be able to precisely duplicate South Slope's manner of entry, it is likely they will find other ways to enter these markets, such as resale, use of unbundled network elements, or other mechanisms. These methods have already been used, or may soon be used, in other parts of Iowa. (Tr. 111-13).

The reality of the marketplace is such that the Board should not expect to see more than two or three facilities-based providers in any particular area in the near future. If the Board requires a showing that other providers are likely to enter the market in exactly the same way as South Slope, then the third criterion from the Board's rules will become an insurmountable barrier and nothing will be left of the statute.

The fourth consideration from the Board's rules is whether there are substitutes for the services in question. While the record on this point leaves something to be desired, I am persuaded by the testimony of South Slope's witness, who stated that he is unaware of any services offered by U S West that South Slope would be unable to duplicate (except, perhaps, for some special or unusual

packages of services). (Tr. 156). I would not require U S West to provide a side-by-side comparison of the services offered by U S West and by South Slope, although I would encourage such a comparison in any future filing.

The final factor in the Board's rules, other relevant considerations, does not affect my opinion. No other considerations have been shown in this record that support or detract from a finding of effective competition.

In conclusion, I am persuaded by the record in this case that U S West is subject to effective competition in the zones where U S West's service territory and South Slope's service territory overlap. Customers in those zones have a choice of service providers offering similar services at different prices. Still, I understand that my colleagues on the Board draw different conclusions from the record. I respectfully disagree with the conclusions drawn by a majority of the Board.

/s/ Allan T. Thoms

ATTEST:

/s/ Raymond K. Vawter, Jr.
Executive Secretary

Dated at Des Moines, Iowa, this 1st day of March, 2000.